STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE CONSUMER PROTECTION BOARD

George E. Pataki
Governor

May M. Chao
Chairperson and Executive Director

November 22,2002

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Cornmission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: CG Docket No. 02-278 and CC Docket No. 92-90, FCC 02-250
In the Matter of Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Dear Secretary Dortch:

Introduction

The New York State Consumer Protection Board ("NYCPB") respectfully submits the following comments and responses to the questions posed in the Notice of Proposed Rulemaking ("NPRM") of October 8, 2002 in the Federal Register to amend the Federal Communication Commission's ("Commission's or FCC's") Rules and Regulations concerning the Telephone Consumer Protection Act ("TCPA) of 1991.

The FCC seeks comments in three broad areas as to whether the Commission should: **(1)** refine its existing rules on the use of auto-dialers, prerecorded messages, and unsolicited facsimile advertisements to account for new technologies and emerging telemarketing practices; (2) adopt any additional rules that may be necessary to ensure that the privacy of individuals is protected consistent with allowing legitimate telemarketing practices; and (3) reconsider the option of establishing a national do-not-call list as authorized by Congress in the TCPA. With regard to the latter issue, the Commission has requested comments for entities not covered by the Federal Trade Commission's ("FTC's") proposed national do-not-call list, as well as the interplay between federal and state do-not-call lists. The Cornmission has requested separate submissions regarding the do-not-call list from all of the other issues upon which it seeks comment (Federal Reqister, Vol. 67, No. 195, October 8, 2002 at page 62668-9).

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Discussion

The NYCPB fully supports the FCC's efforts to expand the opportunity for consumers to prevent unwanted telemarketing sales calls, as we have supported a similar effort by the FTC.[1] The NYCPB is charged with administering and enforcing New York's do-not-call law (see, McKinney's New York General Business Law ("GBL") § 399-z, effective April 1, 2001). Based on our experience under New York's do-not-call law, the NYCPB has found that consumers welcome this type of protection. Our do-not-call Registry currently contains about 2,300,000 numbers, making it the largest such program in the United States. The overwhelming response that we have received from consumers is that the number of unwanted calls has decreased dramatically, and consumers have achieved enhanced levels of privacy in their homes, thanks to New York's do-not-call law. We believe that the FCC's efforts, as well as those of the FTC, in this regard can only improve consumer protection in this area, and we strongly welcome the FCC's initiative, particularly in those areas in which it has primary or exclusive jurisdiction separate from the FTC. We believe that the New York experience under our do-not-call law will be helpful to the FCC in its efforts, and are accordingly providing the following background material for the Commission's use.

A. New York's Do Not Call Law and Rules.

On October 12, 2000, New York State Governor George E. Pataki signed the New York State do-not-call law. The law, and the rules adopted to administer the do-not-call program, became effective on April 1, 2001. Pursuant to GBL § 399-z (2) and 21 New York Code of Rules and Regulations ("NYCRR") §§ 4602.2 and 4602.3. eligible New York State consumers may register for inclusion on the do-not-call Registry for a term *of* three years from the start of the next quarter following the date of enrollment (see, 21 NYCRR § 4602.2(g)). Consumers may sign up for the Registry by using the Internet, by telephone or by a paper application sent via U.S. mail, or by a facsimile transmission. The list of Registry enrollees is updated quarterly, and may be purchased from the NYCPB for a calendar yearly fee of $800.00 for electronic Internet access or CD-ROM (see, 21 NYCRR §§ 4602.5(a), (b), (c) and (d)).

The New York do-not-call law in relevant part prohibits any telemarketer or seller to make or cause to be made any unsolicited telemarketing sales call after a thirty-day grace period from when the then current Registry is published, and after a consumer's name and telephone number appear on the Registry (see, GBL § 399-z (3) and 21 NYCRR §§ 4602.5(f) and 4603.1(a) (1) and (2)). The NYCPB has authority upon a complaint, or upon its own initiative, to conduct an inquiry as to the sufficiency of any alleged violations (see, 21 NYCRR § 4603.1(b)). The NYCPB has authority to assess a fine not to exceed $5,000 for each do-not-call violation. Each call is a separate offense for penalty and enforcement purposes (see, GBL § 399-z (6) *(a)* and 21 NYCRR §§ 4603.1(a) and 4603.4(a)).

The law and rules provide for several exemptions and exceptions. The exemptions generally include not-for-profits, charitable, religious, and political organizations (see, 21

[1] The NYCPB's comments were filed with the FTC on March 26, 2002 in the proposed rulemaking to amend the Telemarketing Sales Rule, 16 CFR Part 310, FTC Rules Number R411001, to which we respectfully refer the Commission.

NYCRR §4602.6(d)). The exceptions generally include calls made in response to an express written or verbal consumer request; an established business relationship which is ongoing; an existing customer relationship within the last 18 months, unless the customer has requested not to be called; and requests for a face-to-face meeting rather than concluding a sale over the telephone (see, GBL § 399-z(1)(j)(i-iv) and 21 NYCRR §4603.2(a)(1-4)).

B. The relationship of New Yorks Do Not Call Law and the Federal Do Not Call Programs.

The NYCPB has been enforcing the New York do-not-call law since May 2001, and we are pleased to share our experiences in administering the law with the FCC with a view toward future cooperation. As the Commission notes, it has explicit authority from Congress to establish and operate a national do-not-call database to prevent unwanted calls to consumers.[2] As discussed in the NPRM, when the Commission first visited the issue in 1992, it declined to establish such a list for reasons of costs, both to the industry and to consumers as the costs are passed on to them; the need for frequent updates; and privacy concerns (NPRM ¶¶ 51-52). As will be discussed in our attached comments, we believe that these concerns have largely been overcome. Further, as we view the FCC NPRM, it is apparent that the proposed national and New York State do-not-call lists are expected to exist concurrently, since Congress has not attempted to preempt state authority in this regard (see. the NYCPB comments regarding ¶¶ 48 and 62-66). The only requirements are that state standards do not violate the federal technical and procedural standards, and that lists incorporate consumer data from that state that exists on any federal do-not-call list to be established.[3] In any event, it would require further action from the New York State Legislature, or changes in our rules, for the New York do-not-call program to be modified from its present form.

With respect to enforcement, if consumers are on both the national and New York State Registries, it appears as though they will be able to seek redress for unsolicited telemarketing sales calls under either state or federal law. While the proposed rulemaking would have no direct effect upon New York State's do-not-call program, other than incorporating registration data from consumers who have registered for the federal program, but not for the state program, it may to lead to consumer confusion, i.e., consumers may likely confuse their rights and remedies under state and federal law. Consumers may register with the FCC. but file complaints with the NYCPB, and vice versa. Should the FTC establish a separate do-not-call list, the potential for consumer confusion will be magnified. Thus, we anticipate the need for close cooperation between the administration of New York's do-not-call program, and any federal do-not-call lists, whether established by the FCC or the FTC, or administered jointly by those agencies.

It is unclear as to where consumers would be best advised to file complaints in every circumstance, receive answers to questions, and generally receive relief from unwanted telemarketing sales calls. Based on the comments we have received in administering New York's do-not-call law, it is clear that consumers are sincerely grateful for the ability to stop most of these calls, subject to certain exemptions and exceptions in our law and rules, by listing their names and phone numbers on the NYCPB's Registry. The proposed federal do-not-call lists by the FCC and the FTC will certainly add a layer of protection

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[2] See, NPRM at ¶ 49, and 47 U.S.C. § 227(c)(3)

[3] See, 47 U.S.C. § 227(e)(1) and (2).

ana enforcement for consumers, but should be designed to work in conjunction with existing laws for the states that already have do-not-call programs. We urge the FCC to work cooperatively with the FTC (as it apparently intends to do) as well as with those states, such as New York, that have do-not-call programs to ensure that consumers have access to a seamless complaint processing system that will secure the most efficacious remedy for their complaints, whether state or federal. To that end, we suggest that a referral system, as well as other appropriate measures, be considered to avoid consumer confusion and frustration. Specific measures are beyond the scope of the present comments to discuss in detail, but the NYCPB will work cooperatively with the FCC and FTC staffs to explore this potential area of cooperation, and to ensure the success of the federal initiatives in this regard.

Neither the FCC, nor the FTC, has addressed the specifics of under what circumstances enforcement on the federal level would take place. In some cases, the calls would be jurisdictional to the FCC, and in others, the FTC. These jurisdictional problems greatly concern the FCC, the FTC, and the NYCPB. but are of little concern to consumers. Consumers will want relief from unwanted telemarketing calls, not a complicated lecture on federal jurisdiction between the FCC and the FTC, or between either or both of these entities, and the State of New York. Thus, we view close federal and state cooperation as absolutely essential to provide complete coverage of all prohibited calls, whether federal or state.

There is also a further need for FCC and FTC coordination with the various states' consumer protection agencies, attorneys general, or other state agencies assigned to administer do-not-call programs. In some states, such programs are administered by consumer protection agencies, such as the NYCPB. In others, the state attorney general has such responsibility. Any rules adopted should be sufficiently flexible to accommodate these divergences, particularly regarding enforcement arrangements.

Further, many states, such as New York, have exemptions and exceptions to their laws and rules. Thus, on a given complaint, enforcement jurisdiction may lie only with the FCC or the FTC, if otherwise exempted or excepted under state law. Alternatively, state laws may be more stringent than the proposed FCC or FTC law and rules, in which event a complaint would probably be referred to the state in question by these agencies. In short, the various states' do-not-call programs, and their laws and exceptions, should be integrated into the workings of a national do-not-call program, and work smoothly together. These matters should hopefully be addressed prior to any federal do-not-call list implementation. To that end, we pledge our best efforts to work cooperatively with the FCC and the FTC in this regard.

Finally, it would be extremely anomalous if the federal government established two do-not-call registries by *two* separate federal agencies, and left consumers adrift to sort out the jurisdictional questions. We strongly recommend that the FCC and the FTC coordinate their lists, if established, such that there is only one federal list. Complaints could then be forwarded to the appropriate federal agency for enforcement, but consumers should not have to make that determination initially when they file a complaint. Complaints could also be forwarded to the states, including New York, as appropriate, if federal resources are

taxed initially in handling calls from consumers in states that do not have do-not-call programs, as may well occur. In any event, this is simply to suggest some of the problems that may arise, not to proffer any solutions, which should be explored in detail when the decision to establish a federal list, or lists, is made. These questions are explored in more depth in our attached responses to the FCC's questions, and we have raised similar concerns in our previously filed comments with the FTC.

Conclusion

We hope that our comments regarding New York's experience with our do-not-call law and rules, as well as our responses to the FCC's questions, are helpful in assisting the FCC in executing a comprehensive, effective national do-not-call list, hopefully in close coordination with the FTC as well as the various states that have do-not-call programs. We would be glad to assist the FCC and the FTC in any way that we can to further our mutual goal of enhanced consumer protection from unwanted telemarketing sales calls.

For further coordination regarding these matters, as well as any questions that you may have, please contact our General Counsel, James F. Warden, Jr., at (518) 486-3934.

Respectfully submitted,

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Enclosures:

(1) NYCPB Responses to the Proposed Rules Other Than Issues Relating to a National Do-Not-Call List.
(2) NYCPB Responses to the Proposed Rules Relating to a National Do-Not-Call List.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278 CC Docket No. 92-90
	)	FCC 02-250

Responses To The Proposed Rules Other Than Issues Relating To A National Do-Not-Call List

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Dated: November 22,2002
Albany, New York

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Responses To The
Proposed Rules Other Than
Issues Relating To A National
Do-Not-Call List

To. The Commission

The New York State Consumer Protection Board ("NYCPB") hereby respectfully submits the following responses in answer to the Federal Communications Commission's ("FCC's, or Commission's") questions that are contained in the Notice of Proposed Rulemaking and Memorandum Opinion and Order ("NPRM" or "Notice"), which was adopted September 12, 2002, released September 18, 2002, and noticed in the Federal Register, Vol. 67, No. 195. at pages 62667 et seq. on October 8, 2002. The NYCPB will reference the appropriate paragraph number in the September 18, 2002 Notice, and then give our response.

Further, In accordance with the Commission's directions in the October 8, 2002 Federal Register at page 62669, this portion of our comments will concern the proposed rules changes that affect matters other than the possible establishment of a national do-not-call list. Matters relating to the national do-not-call list are in a separate document enclosed herewith. Also, please also refer to the November 22, 2002 cover letter accompanying these question responses where some of the more important issues to the NYCPB, as well as details of the New York do-not-call program, are highlighted.

Finally, the NYCPB will not attempt to answer all questions, but only those for which we believe there is a significant New York consumer interest

NPRM, ¶¶ 1-12. Introduction and Background Material

No comment.

NPRM, ¶¶ 13-14. Company-Specific Do-Not-Call Lists.

The NYCPB has received several complaints with respect to the federal company-specific do-not-call approach. Many consumers have found it ineffective because of some companies' inability to give the consumer an opportunity to make the request in the first instance (such as giving another number to call rather than taking the request immediately), or companies may not honor the request even when made, and consumers receive subsequent unwanted calls. Occasionally, particularly for recorded messages, there is no opportunity to ask not to be called again.

Further, consumers find this approach to preventing unwanted telemarketing calls burdensome, since calls are always received in the first instance, even if unwanted, and consumers must make a specific request to stop subsequent calls. New York has found that consumers would rather have a "one stop" do-not-call program rather than having to advise each and every company that they do not want to be called.

Finally. the NYCPB has no comment with respect to the effectiveness of the do-not-call program within the community of persons who have special needs.

NPRM. ¶ 15. Predictive Dialers and Answering Machine Technology,

From a consumer standpoint, there are no legitimate free speech interests being promoted by these calls because no speech is being communicated in the event of "dead-air" or "hang-up" telecommunication. These calls are particularly offensive, since the consumer does not even have a live operator to ask that no calls be made in the future. Further, we have received several complaints that the identification of the callers is often incomplete, and often there is no number given to call to prevent such calls in the future. For all of the preceding reasons, a do-not-call list would be far more effective in preventing these calls than simply the ability to ask not to be called again

NPRM, ¶ 16. Advantages of Company Specific Do-Not-Call Lists

Although the NYCPB can provide no statistical or empirical data on this issue, in general, the anecdotal information that we have received indicates that New York consumers find the company-specific approach very cumbersome. Although many companies do keep internal lists,[1] it is confusing to consumers to have to keep track of so many lists

While selectivity may have some surface appeal, we have received very few comments that a more selective approach to do-not-call by caller, rather than a do-not-call list, is more appropriate. The overwhelming sentiment is in the other direction in that consumers complain about the exceptions and exemptions to the existing do-not-call law and rules, rather than not being allowed to receive selected calls. The decided consumer preference is for a do-not-call list that provides for a "one-stop" solution rather

[1] See 47 U.S.C.§ *227* (c) and 47 C.F.R. §§ 64.1200(e)(2)(iii) and (vi).

than repeatedly having to notify a series of telemarketers that they do not wish to be contacted again. Therefore, the NYCPB does not recommend that the company-specific approach be retained

NPRM, ¶ 17. Company Specific Do-Not-Call List Modifications

To the extent that the Commission retains the company specific approach, which we do not recommend (see our response to ¶ 16), the NYCPB has the following recommendations. First, companies should be required to provide residential consumers a cost-free way to put their names on the specific do-not-call list through the use of a toll-free number, or by taking the do-not-call request during the first call. A website could also be provided. We have had numerous complaints from consumers that they have had to resort to calling at their own expense, and, in few instances, were actually charged a 900, or other toll-call charge, in their attempts to stop further telemarketing calls. This state of affairs is highly undesirable

Second, companies should be required to affirmatively inform consumers that they have the right to make such a request, whether taken by the telemarketer at the time of the call, or employing the toll-free option procedure. This requirement should not be unduly burdensome.

Third, companies should be required to process telemarketing call removal requests within thirty days, retain the consumer's name and telephone number on *the* do-not-call telemarketing list for at least ten years, and be required to send a written or e-mail confirmation to the consumer. This confirmation should aid in the enforcement process if disputes arise.

NPRM, ¶¶ 18-19. Interplay Between 47 U.S.C. §§ 222 and 227.

47 U.S.C. § 222 concerns the duty of telecommunications carriers to protect the privacy of consumer information,[2] while the 47 U.S.C. § 227 provisions include the possible establishment of a national do-not-call list (see 47 U.S.C. § 227(c)). The section 222 rules provide for marketing to consumers using the proprietary information, using both "opt-in" and "opt-out" procedures to address privacy concerns.[3] The question the Commission wishes addressed is whether the existing rules providing for "opt-out" solicitations should be overridden by a consumer's enrollment on a national do-not-call list. The NYCPB believes that enrollment on a national do-not-call list should take precedence over the prior implied consent through the "opt-out" procedure, but that the latest in time should prevail regarding "opt-in" consents.

First, the "opt-out" procedure is a weak form of consumer consent that allows the consumer to be solicited, and may result from simple inaction, inattention to a notice sent, or other such insubstantial considerations. Such a form of consent should be used only when no active consumer harm may result. Thus, a review of the CPNI Order indicates that, while the "opt-out" consent was permitted for carriers and affiliated entities providing communications services, only "opt-in" consent was permitted for unrelated third parties, or even affiliates that did not provide communications services.

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[2] See also the Commission's recent order in Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115, 96-149, 00-257, FCC 02-214, released July 25, 2002 (the "CPNI Order").

[3] Generally, the "opt-in" procedures for the release of consumer information involve getting actual consent from the consumer, while the "opt-out" procedures require the consumer to affirmatively indicate that he/she does not consent, or the consent will be assumed absent an "opt-out."

See the CPNI Order at ¶ 2. This approach substantially limited the dissemination of information related to consumer information that could be accessed absent "opt-in" consent, and was done only after an adverse court decision.[4]

Second, the NYCPB believes that an affirmative expression of consumer preference (enrollment on a do-not-call list) should take precedence over what may well be uninformed implied consent (ignoring an "opt-out" notice). Therefore, a prior section 222 "opt-out" notice should be overridden by enrollment on a national do-not-call list

Third, as to constitutional standards, as the Cornmission notes, only one channel of communication (the telephone) is affected. Thus, the overall standards of Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 341 (1980). and, more recently, U.S. Postal Service v. Hustler Maqazine, 630 F. Supp 867 (D.C.C. 1986)(alternate channels of communication must exist) appear to be met, since the consumer may be reached by mail, e-mail, advertising, etc., even after "opt-out" or "opt-in" procedures, or even after do-not-call lists are used. See also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

Fourth, the CPB sees no reason why either an "opt-out" or "opt-in" consent should not be cancelled by being listed on a do-not-call list, providing the latter is the latest expression of consumer preference. If a consumer has either failed to exercise an "opt-out" preference, or even affirmatively consented via an "opt-in" consent, and changes that preference through a national do-not-call list, the latest expression of the

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[4] See, Competition Policy Institute v. U S. West, 182 F.3d 1224 (10th Cir. 1999), cert. den. 530 U.S. 1213, 120 S.Ct. 2215, 147 L.Ed.2d 248 (2000).

consumer's wishes should prevail. However, a subsequent "opt-in" choice should prevail over the do-not-call list, since that is a stronger form of consent than "opt-out" consent

This suggested procedure is similar to the way New York administers its do-not-call program. If we receive a complaint from a consumer on the Registry, but the alleged violator can show that the call was in response to an express written or verbal request of the customer (see General Business Law ("GBL") § 399-z(1)(j)(i) and 21 NYCRR § 4603.2(a)(1)), the complaint is invalid, unless the consumer can show the consent was subsequently withdrawn

Finally, consumer confusion would be minimized by allowing a section 227 do-not-call request to trump "opt-out" or "opt-in" consents under section 222. Simply put, if the consumer affirmatively requests not to be contacted, he will be very confused by a complicated explanation of why his prior "opt-out" or "opt-in" preferences are not cancelled out by his latest expression of preference -- affirmative enrollment on a national do-not-call list -- as should be the case

NPRM, ¶ 20. Established Business Relationship Exception – Different Products and Services.

The Commission seeks comment on whether a company that has an established business relationship based on one type of product or service can call regarding another product or service. The NYCPB's view is that such solicitations should be permitted, provided that such permission is restricted to the same business entity, and does not extend to related business entities, or separate parents or subsidiaries. The

consumer's choice, including consumers on a do-not-call list, has been previously expressed by a course of conduct of doing business with that entity, so the calls should be permitted. If the consumer terminates the relationship, the permission to call *is* also thereby terminated. See, e.g., GBL § 399-z(1)(j)(ii) and 21 NYCRR § 4603.2(a)(2)

NPRM, ¶ 21. Network Technologies/ANI

No comment

NPRM, ¶ 22. Caller ID.

The Commission seeks comment on whether telemarketers should be required to transmit "caller ID" information to consumers. The NYCPB believes that a common-sense approach to this issue should be adopted.

A "caller ID" requirement would greatly facilitate the identification of alleged do-not-call violators, should the Commission decide to establish a national do-not-call list. Adoption of this requirement would also greatly assist state enforcement of do-not-call alleged violations. Telephone solicitors are not mandated to provide this information now under existing New York law, which simply prohibits intentional blocking of caller ID information For someone who breaks the law, enforcement is with the New York Attorney General's Office (see, GBL § 399-p(6-a)). However, unless the consumer receives the calling number or name information during the call, enforcement is generally impossible precisely because of the blocking. It is equally difficult to enforce potential do-not-call violations for the same reason.

Our information is that most of the network constraints that may have prevented the delivery of caller ID information by telephone service providers when the TCPA order was first adopted in 1992 have now been removed. However, premises equipment constraints may remain, particularly for smaller firms. The equipment in place may routinely transmit caller ID information, may be capable of modification to transmit such information, or may not be able to be so modified. While mandatory transmission of caller ID information would undoubtedly facilitate do-not-call enforcement on both the state and federal level, our concern in this area is that we would not want to impose onerous burdens on smaller, less technically sophisticated firms that would effectively put them out of business if they could not transmit such information. Thus, we believe that a requirement prohibiting intentional blocking by telemarketing firms is appropriate, but an affirmative requirement that caller ID information must be transmitted may be inappropriate for technical reasons, particularly for smaller firms, at the present time.

A solution may well exist through time, however, since the technology in this area is rapidly changing, and a five year replacement cycle appears to be the norm from anecdotal information we have been able to gather for premises equipment, particularly for the larger telemarketing firms. Thus, it would appear that a Commission requirement that new systems installed after a certain date in the future have the capacity to transmit caller ID information would be reasonable. This would ensure that normal replacement equipment is so equipped, and would, of course, apply to initial installations.

A mandatory requirement that all firms over a certain size (such as over five employees), have such equipment installed as of a future date certain would ensure that

firms that are in longer replacement cycles, or are relatively small, eventually comply with the caller ID requirement. The "mom and pop" telemarketing firms of five or under employees would remain exempt, except for the installation of new equipment,

The approach we have suggested would balance the enforcement need for caller ID capability at some point with the very real consideration that smaller firms not be unduly burdened in coming into compliance, and the very smallest firms would remain exempt except as to replacement equipment.

NPRM, ¶¶ 23-27. Auto-Dialers, Predictive Dialers, and Answering Machine Detection "AMD" Calls.

The NYCPB concurs with the Commission's reading of the legislative history of the TCPA, which suggests that auto-dialed calls are more intrusive to the privacy concerns of the called party than live solicitations. Based on the information we have received, consumers are generally more frustrated when confronted by an automated call than they would be by a live operator call, even if the intrusion by both is resented While an auto-dialer may well increase productivity for a particular telemarketing firm by generating more calls to residences than a telemarketer can manually, the cost is generally paid in consumer annoyance and frustration.

The goal of better balance by limiting auto-dialed advertising to protect consumers against the economic burdens placed on telemarketers is elusive. The technology is simply too attractive *to* telemarketers to forgo as a marketing tool particularly when coupled with pre-recorded messages. Yet, based on information provided by consumers, those are exactly the type of calls they most resent.

The adoption of a national do-not-call list, together with the salutary effects from the various state lists, would solve this problem indirectly by prohibiting most telemarketing calls, including the calls using the most intrusive technologies and practices, for consumers who do not wish to receive these types of calls. The main problem we have been informed of by consumers in this area is the inability to speak to a live operator to ask not to be called again. The do-not-call list would solve this problem indirectly for automated and predictive-dialed calls, particularly for those that only selectively employ live operators. Further, the abandonment rate standard of 5% of answered calls per day, the maximum setting on the number of abandoned calls proposal, or requiring telemarketers who use predictive dialers to also transmit caller ID information (see NPRM, ¶ 26) all appear to be additional safeguards that are clearly worthwhile. Similar restrictions could be implemented on Answering Machine Detection ("AMD") calls

NPRM, ¶¶ 28-29. Identification Requirements.

Consumers should have an opportunity to identify their callers. Caller identification information would also be very useful in enforcing a do-not-call law at either the state or federal level

Further. the Commission regulations which require that a person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted should be retained. Requiring telemarketers to specifically identify themselves assists with

enforcement, and empowers consumers to act on their own behalf by contacting the company directly if they no longer wish to receive telemarketing calls, assuming a national do-not-call list is not adopted

Finally, we have had many complaints regarding abandoned calls. The consumer answers the phone, and then the caller simply hangs up. In many cases, this situation results from the fact that the caller has not received an earlier response, and assumes the call is not being answered, and then hangs up as the consumer answers the call. These annoying calls also tend to be repetitive. Unless technological constraints exist (see the CPB caller ID discussion at ¶ 22), companies should be required to provide their identification whenever possible, and also employ technology that would ensure that such calls are not terminated if the consumer answers. Then the consumer would be in a position to either ask that such calls not be repeated, or to report do-not-call violations to federal or state authorities as appropriate.

NPRM, ¶¶ 30-31. Prerecorded Voice Message Calls.

The NYCPB agrees that the rules should include a provision that makes it clear that calls containing offers for free goods or services are prohibited without the prior express consent of the called party. Effectively, these are commercial calls even if no sale is attempted during the call, since a sale is certainly envisioned at some later point. New York consumers who enroll on our do-not-call list have expressed the choice that they would not like unsolicited calls coming into their homes. A rule that would prohibit such calls unless expressly invited by the consumer would aid practical business purposes by allowing telemarketers to make more effective use of their resources, and

allow the consumers *to* be active participants in deciding what calls are allowed to come into their homes.

NPRM. ¶ 32. Prerecorded Tune-In Messages.

The NYCPB has not received any complaints of this type. Generally, such calls would not be prohibited under our rules, since no sale is attempted over the phone. See, 21 NYCRR § 4602.6(f).

NPRM. ¶ 33. Tax-Exempt Nonprofit Organizations.

Generally, the State of New York exempts non-profit and charitable organizations, as well as political and religious organizations, from the operation of our do-not-call program, See 21 NYCRR § 4602.6(d). The Commission has generally followed this approach as well (see NPRM, ¶ 33),[5] and seeks comments, particularly on the charitable organizations, as well as the for-profit entities that may solicit on their behalf, as to whether they should continue to be exempt from the TCPA.

The NYCPB believes that such exemptions should continue, not only for the charitable institutions themselves, but for organizations that solicit on their behalf. However, we have had numerous complaints from consumers regarding some very aggressive and repetitive charitable solicitations that are considered as intrusive and annoying as commercial solicitations by the affected consumers. Contrary to the discussion in NPRM, ¶ 33, these non-commercial calls are certainly on a par with some of the commercial calls as to consumer inconvenience. We are also aware that for the

[5] *See* 47 U.S.C.§ 227(a)(3)(C).

organizations involved, telemarketing is a very substantial part of their fund-raising efforts. We recommend that the Commission should consider keeping such entities exempt as at present, but imposing a requirement that a consumer request not to be contacted again after the first call be honored. This suggestion may require a statutory change. However, it would address repetitive charitable solicitations, while still allowing the charity or its agent to make initial solicitations. The time limit could be the existing 10 years for other such requests. See, 47 CFR § 64.1200(e)(2)(vi).

NPRM, ¶¶ 34-35. Established Business Relationship.

The State of New York has an established business relationship exemption, as well as the FCC, in our do-not-call program. See GBL § 399-z(1)(j)2) and 21 NYCRR § 4603.2(a)(2). The problems in administering the law and rules typically arise in interpreting the facts that constitute the formation of such a relationship, and the facts that typically terminate such a relationship. Some companies have argued that a simple consumer phone inquiry not only voids any listing on the NYCPB's do-not-call list, but establishes a business relationship as well regardless of whether there is any actual sale of goods or services for consideration.

The FCC regulations provide that an "established business relationship" is defined as "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party."

See, 47 CFR § 64.1200(f)(4). However, the NPRM discussion clearly qualifies this exception to exclude what are effectively casual inquiries with the requirement that some sori of permission exist in order for subsequent contact to be made.[6]

New York's approach is similar in concept to the Commission's interpretation of its rule. A mere inquiry, or a simple phone call, is insufficient to create an established business relationship. This is clear from a review of the New York do-not-call law and rules. The business relationship exception, GBL § 399-z(1)(j)(ii) and 21 NYCRR § 4603.2(a)(2), must be read in pari materia with the entire exceptions section in the regulations, or all of 21 NYCRR § 4603.2, particularly 21 NYCRR § 4603.2(a)(3) as well as sections (b) and (c) of that regulation. 21 NYCRR § 4603.2(b), in defining the term "established business relationship," requires the "existence of an oral or written arrangement, agreement, contract, or other such legal state of affairs between the telemarketer and an existing customer where both parties have a course of conduct or established pattern of activity for commercial or mercantile purposes and for the benefit or profit of both parties (emphasis added)." This is further amplified in 21 NYCRR § 4603.2(c), where an "existing customer" is one "who has entered into an arrangement, agreement, contract, or other such legal state of affairs between the telernarketer and the consumer where the payment or exchange of consideration for any goods or services has taken place within the preceding eighteen (18) months, or has been previously arranged to take place at a future time."

Thus, to qualify for the "business relationship" exception, an "existing customer" relationship must also exist, since that is part of the 21 NYCRR § 4603.2(b) definition of

[6] See, the discussion in **the** NPRM at **¶¶ 34-35.**

an "established business relationship," and requires an exchange of goods or services for consideration within the preceding eighteen months.

Further, GBL § 399-z(1)(j)(i) and 21 NYCRR § 4603.2(a)(1) require that "an express written or verbal request of the specific customer called" exist before a call should be made. There would be little point in requiring an express request to be called if a call could be sanctioned by a simple inquiry, or a "business relationship" thereby established. Thus, the so-called "implied permission" by a consumer who may contact a company even though he or she is on the do-not-call Registry is ineffective, given the express language of GBL § 399-z(1)(j)(i) and 21 NYCRR § 4603.2(a)(1). The "established business relationship" must of necessity have more elements than a mere casual phone call inquiry, and such casual phone call inquiries do not rise to the level of the "express verbal or written request" requirements of GBL § 399-z(1)(j)(i) and 21 NYCRR § 4603.2(a)(1).

Finally, the termination of such a relationship, assuming one has been established, generally takes place after the 18 months have elapsed, or the consumer asks the business not to contact him or her again. With regard to the latter, a subsequent call would constitute a violation under New York even for prior customers within the past 18 months. See GBL § 399-z(1)(j)(ii) and (iii), and 21 NYCRR § 4603.2(a)(2) and (3).

We would suggest that the TCPA business exception be similarly interpreted to address the so-called consumer inquiry problem, since the existing federal regulation, while clarified by an earlier Commission order cited in the NPRM, is less than clear on its face. Thus, casual inquiries, without more, should not normally establish a business

relationship, nor should the other examples cited in NPRM, at ¶ 34. While a course of conduct can, of course, establish such a relationship, a consumer's request to be placed on a do-not-call list should be persuasive evidence that, absent express permission or a relatively recent transaction for consideration, the consumer does not wish to be contacted. A request not to be contacted again after a first call should be honored, even should another casual inquiry intervene.

NPRM, ¶ 36. Calling Hours Restrictions.

The NYCPB believes that the calling hours restrictions have generally worked well, are consistent with the FTC's regulations, and should be retained.

NPRM, ¶¶ 37-39. Unsolicited Facsimile Advertisements.

Effectively, the existing law and regulations affecting facsimile transmissions prohibit the transmission of unsolicited advertisements to facsimile machines without the person's prior express invitation or permission.[7] Although New York does not have a similar law, our experience in referring consumers to the FCC for resolution of these complaints has been very satisfactory. Further, New York does have facsimile hours of calling restrictions, and also permits consumers to specifically notify fax senders that they do not wish to receive further messages. If further messages are received, there is a private right of action for $100, or actual damages, whichever is greater. See, GBL § 396-aa.

[7] See, 47 U S C. § 227(b)(1)(C), and 47 C F R. §§ 64 1200(a)(3) and 64.1200(f)(5)

As to prior express permission, the case-by-case approach adopted by the Commission may be the only one that is feasible. For instance, with regard to the Commission's question concerning group or trade membership, if a consumer is a member of a group, or professional association, and has given both a facsimile number as well as permission to the group to be solicited in completing membership forms, as an example, it would not be fair to the telemarketer for the group to negotiate a vacation package through a vendor, the vendor (relying on the number furnished and the prior permission) contact the consumer directly, and then be accused of a facsimile violation by the consumer, who may not even recall giving his permission

Further, the Commission has asked for comments on whether the business relationship exception, which effectively has created an exemption within the facsimile category (NPRM. at ¶ 39), should be preserved. We would recommend that it be preserved since consumers have voluntarily entered into the business relationship, and always have the option to terminate it. Consumers should also have the option to terminate facsimile communications while still preserving the relationship, since these may be more burdensome than telephone calls. We suggest that the only problem in this area may be ease of termination, and if a toll-free number were provided during the facsimile transmission, this would largely eliminate this concern.

Finally, we believe that adoption of appropriate rules based on the Commission's experience in administering the facsimile rules is entirely appropriate, since potential transmitters of facsimile communications should be on reasonable notice as to what are, and are not, acceptable practices in this area

NPRM. ¶ 40. Fax Broadcasting

Fax transmissions are not prohibited under the New York do-not-call law and rules, but there are some restrictions. See, the discussion at ¶¶ 37-39

NPRM. ¶¶ 41-46. Wireless Telephone Numbers.

Many New York consumers use their cellular service primarily for residential use. Occasionally, wireless rates may be more competitive than home rates according to anecdotal information we have received, thereby encouraging households to make more use of wireless communications. Further, households with internet service may experience increased use of cell phones, since the ordinary landline phone may be busy with computer usage by other members of the family.

New York consumers have experienced an increase in the number of telemarketing calls they receive on their cell phones, which posed regulatory challenges for the NYCPB do-not-call program. We believe that the rules that apply to solicitations to home telephone numbers under 47 CFR § 64.1200(e) are equally appropriate for cell phones. This would also simplify enforcement, particularly for phone numbers that are ported from wire to wireless

NPRM, ¶ 47. Private Right of Action and Individual Complaints.

The NYCPB believes that the private right of action should apply to more than one telephone call received, rather than be triggered by a single call. This provides a margin for error that is reasonable for telemarketers, eases enforcement burdens, and is not overly burdensome to consumers.

Further, as to informal complaint resolution, the NYCPB does a considerable amount of such work in our Consumer Assistance Unit ("CAU") for general consumer cornplaints, and the results are generally satisfactory for both businesses and consumers. While we do not get involved in private right of action matters in our do-not-call program, there is no reason such a procedure could not facilitate settlements in that area as well.

For consumer matters generally, the CAU complaint resolution procedure provides a cost-free alternative for consumers and businesses to a small claims court lawsuit, which can still be brought should they not be satisfied with the NYCPB's mediation efforts. Additionally, we have found that both businesses and consumers appreciate the legal and practical opinion of a disinterested third party, and we find that many disputes are able to be amicably resolved by mediation.

Additionally, the NYCPB also refers utility complaints that we are unable to resolve to the New York State Public Service Commission, which has an informal complaint resolution procedure. We find that such referrals receive prompt, professional attention, and that consumers are generally satisfied with the results. Therefore, we recommend the Commission extend such procedures to consumer complaints regarding telemarketers as well.

NPRM, ¶ 48. State Law Preemption.

The NYCPB's view is generally that, with regard to more restrictive state laws, they are not preempted for the reasons stated in the NPRM at ¶ 48. See also 47 U.S.C.

§ 227(e)(1), which notes that more restrictive intrastate requirements or regulations are not preempted. Indeed, the law provides that if the national database is established by the Cornmission (see 47 U.S.C.§ 227(c)(3)), such database shall "be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;" See 47 U.S.C.§ 227(c)(3)(J). Further, the chief requirement for the states is that "If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State." See 47 **U.S.C**§ 227(e)(2).

Additionally, some states, such as New York. regulate what are clearly interstate calls, provided that such calls terminate in New York. See GBL § 399-z(l)(d), which provides that "doing business in this state" means conducting telephone sales calls: (i) from a location in this state; or (ii) from a location outside of this state to consumers residing in the state;" See also 21 NYCRR § 4602.3(a). Traditionally, such in personam state jurisdiction is proper, providing there is the requisite nexus with the state, such as calls for business purposes to New York State residents. See McKinney's New York Civil Practice Law and Rules ("CPLR") § 301; CPLR Comment C301:8; Landoil Resources Corp. v. Alexander & Alexander Services, Inc., 77 N.Y.2d 28, 33, 563 N.Y.S.2d 739, 565 N.E.2d 488 (1990). Additionally, New York's "long-arm" statute, CPLR§ 302, provides another source of in personam jurisdiction. See, CPLR § 302(a)(1); CPLR Comments C302:1 and C302:6; Kreutter v. McFadden Oil Corp., 71

N.Y.2d 460, 467, 527 N.Y.S.2d 195, 522 N.E.2d 40 (1988)(a single act of business suffices).[8] The intrastate requirements imposed on firms by New York's do-not-call law that conduct interstate business are entirely proper, and have not been preempted by federal law, even for calls that originate outside of New York State.

The NYCPB believes that approach should continue, and that any FCC national do-not-call list should constitute an additional option for consumers.[9] Absent amendment of our enabling legislation (see, GBL § 399-z(1)(d)), or explicit federal pre-emption, which is not evident in 47 U.S.C. § 227(e), the NYCPB will continue to enforce our law with regard to both interstate and intrastate calls.

This approach is consistent with existing law. As a general matter, to the extent Congress has not explicitly preempted state law, such preemption does not occur, even where such preemption could occur (see, AT&T Corp v. Iowa Utilities Board, 525 U.S. 366, 382, n. 8, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999)) ("Insofar as Congress has remained silent, however, § 152(b) continues to function," referring to the state powers reservation clause in the FCC legislation). See, 47 U.S.C. § 152(b), and Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374-375, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986), where the court noted: "Thus, we simply cannot accept an argument that

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8 The current in personam "long-arm" requirements were generally set forth in International Shoe Company v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny, where the jurisdiction can be asserted if the person has appropriate contacts with the state, and that litigation in that state is appropriate.

9 The FTC proceeding regarding a national do-not-call list, which preceded the instant FCC proceeding, refers to its proposed national list as an "option" for consumers, and other options would presumably include listing on a state list as well. The FTC also notes that some states may rescind their own provisions dealing with interstate calls when the Rule becomes effective. but are apparently not required to do so (see, FTC NPRM to Amend the Telemarketing Sales Rule, 16 CPF Part 310, FTC File Number R411011, at 77, 117)

the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do."

Simply put, Congress has not explicitly preempted any state laws that establish and maintain do-not-call lists in favor of a similar federal approach for either interstate calls terminating in the state, or intrastate calls, nor is there any evidence that such state laws are counterproductive to federal regulation. American Financial Services Ass's v. Federal Trade Commission, 767 F.2d 957 (D.C. Cir. 1985), cert. den. 475 U.S. 1011, 106 S.Ct. 1185, 89 L.Ed. 2d 301 (1986). Nor can any intent be discerned to occupy the field. Florida Lime &Avocado Growers v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). Quite the contrary, since the statute not only deals with preemption, but limits the reach of federal requirements to the use of federal data in state lists. Thus, nothing need be inferred as to Congress' preemptive intent – it was explicit and limited. See Van Bergen v. Minnesota, 59 F.3d 1541, 1548 (8th Cir. 1995). In the absence of explicit statutory preemption, the FCC cannot preempt state law dealing with interstate calls through its present rulemaking proceeding.[10]

As we noted in our previously submitted FTC comments, op. cit., in order to preempt state do-not-call lists, the FCC must show that the Supremacy Clause of the United States Constitution, Article VI, Clause Two, has been invoked by Congress in the Act, and that the following preemption tests have been met:

[10] Indeed. Congress is well aware of states' efforts with regard to the establishment of do-not-call lists, and has not acted to preempt state do-not-call legislation in favor of either FTC or, *in* this instance, FCC, actions that might lead to the establishment of a national list that would preempt all state lists. See also the discussion in Bergen at 59 F.3d 1541, 1548 on this issue.

(a) Congress expresses a clear intent to preempt state law;

(b) There is outright or actual conflict between state and federal law;

(c) Compliance with both federal and state law is in effect physically impossible;

(d) There is implicit in federal law a barrier to state regulation;

(e) Congress has legislated comprehensively, occupying the field with no room for the states to supplement federal law;

(f) State law stands as an obstacle to the accomplishment and execution of the full objectives of Congress; and,

(g) Congress has delegated the authority to the FCC to preempt state law.

See, Louisiana v. PSC, *supra.* 476 U.S. 355, 369, 370, where these tests are summarized, and the various authorities discussed (citations omitted). See also Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985), which repeats with approval the earlier Jones case discussion that the assumption is "that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[11] In short, with regard to jurisdiction, what is not clearly federal is clearly state jurisdiction by operation of Hillsborough.

The FCC's possible establishment of a national do-not-call list is properly viewed as an additional protection for consumers, not a preemption of any rights they may have

[11] See Jones v. Rath Packina Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed 2d 604 (1977), and Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S.Ct. 2240 (1996). Cf. People of the State of New York v. FCC, 267 F.3d 91, 102 (2d Cir. 2001), where the Louisiana standard of an explicit arant of Congressional authority was upheld, but found to be present because of the explicit grant of federal authority in 47 U S C § 251(e) There is no such explicit grant of authority in the FCC's enabling legislation with regard to preemption of state do-not-call laws, even for interstate calls.

under existing state laws. Such rights remain fully enforceable under state law for the reasons stated *supra*

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This concludes the NYCPB responses to the FCC questions contained in paragraphs 1-48, which generally concern rules issues other than the establishment of a national do-not-call list. Should the FCC require any clarification of our responses, or require any additional information, please contact our General Counsel, James F Warden, Jr. at (518) 486-3934, or at the address shown on the November 22, 2002 cover letter accompanying these responses

Respectfully submitted,

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